

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

314
BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-979

490

CHARLES PINO,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 13 1966

Nathan J. Paulson
CLERK

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the indictment was faulty and should have been dismissed because it followed the wording of the statute and alleged act constituting the offense in vague, generic terms without the necessary clarity and specificity?

2. Whether the indictment was faulty and should have been dismissed because it failed to allege intent, a necessary element of criminal assault?

3. Whether it was plain error for the Trial Court to fail to instruct on intent, an essential element of criminal assault?

4. Whether the Trial Court erred in refusing to grant Appellant's motion for judgment of acquittal at the end of the Government's case-in-chief and after the close of all the evidence?

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I

JURISDICTIONAL STATEMENT

On September 27, 1965, Appellant was named, with his brother, Louis Pino, in a two-count indictment charging assault on a member of the police force in violation of D.C. Code § 22-505(a). On October 8, 1965, Appellant entered a plea of not guilty at arraignment.

At trial, the second count of the indictment was dismissed. The jury found the Appellant guilty on the remaining count on December 17, 1965. On January 26, 1966, Appellant was sentenced pursuant to the Youth Correction Act, 18 U.S.C. § 5010(b), and was granted leave to appeal in forma pauperis, notice of appeal having been filed the same day. This Court's jurisdiction of the appeal is founded upon 28 U.S.C. § 1291.

II

STATEMENT OF THE CASE

This case came for trial by jury before the Honorable Luther W. Youngdahl on December 14, 1965.

At the beginning of trial, the Court read the indictment to the panel of prospective jurors and conducted voir dire examination (Tr. 3-16).

After the Government's opening statement, counsel for Appellant Louis Pino requested a bench conference and suggested to the Court that the first and second counts of the indictment were redundant (Tr. 21). The Court then, sua sponte, dismissed the second count upon the suggested ground (Tr. 21). The Court then criticized the wording of the remaining count for using terms in the conjunctive whereas the same terms are used in the statute in the disjunctive (Tr. 22).

Counsel for Appellant Charles Pino then moved to dismiss the entire indictment (Tr. 22). The Court denied the motion, stating: "As long as I charge the jury properly there is no basis for that" (Tr. 23). Commenting on the entire indictment, the Court indicated that "this is the first one I have seen like this in fifteen years" (Tr. 23). Counsel for the Government, an able lawyer of long experience with the U.S. Attorney's Office, also admitted that the indictment was "something new to me" (Tr. 23).

The first witness for the Government was the complaining

witness, Officer Charles R. Riker of the Metropolitan Police Department (Tr. 25). Officer Riker testified that at approximately 1:30 in the morning of September 11, 1965, he was present at a tavern known as Guy's Restaurant, located in the 500 block of Eighth Street, S.E., in the District of Columbia (Tr. 26). Officer Riker stated that he observed the Appellant Louis Pino and another individual fighting on the dance floor (Tr. 27). Officer Riker asked Louis Pino to come outside "to talk it over" (Tr. 27). As they were leaving the establishment together, Officer Riker testified that he dropped his baton and as he reached over to pick it up, Louis Pino pushed him up against the bar stool and then ran out the door (Tr. 27).

Officer Riker testified that he pursued Louis Pino out the door and arrested him outside (Tr. 28). Officer Riker stated that as he was holding Louis Pino, someone "reached up over" his shoulder. When he turned to see who it was, the person hit him in the jaw (Tr. 29). As he turned from the blow, Officer Riker stated that Louis Pino "hit me in the mouth" (Tr. 29).

Officer Riker then testified that at the time this happened, a "big fight" was in progress (Tr. 29). He said he chased Louis "up Eighth down to G, behind the Marine Barracks, which is in the 700 block of Eighth Street" (Tr. 29). At the time, Officer Riker said he was "so dazed" he couldn't run any further" (Tr. 29). He said he later learned he had a broken jaw (Tr. 30). Officer Riker then identified Charles Pino as one of the persons who struck his jaw (Tr. 30). Officer Riker also testified that he was in uniform and was on duty at the time of the alleged

assault (Tr. 31).

On cross-examination, Officer Riker stated that Officer John R. While of the Metropolitan Police Department, who was dressed in plain clothes (Tr. 33), was also present at the tavern. Officer Riker testified that early the same morning as the alleged assault, he went to D.C. General Hospital and identified Louis Pino, who had been injured in an unrelated automobile accident (Tr. 37-38). Officer Riker also testified that he did not remember arresting one John Edward Lee, despite being credited as the arresting officer in the precinct arrest book (Tr. 39, 47).

The next day of trial, when the arrest book had been brought to Court and marked as Defendant's Exhibit No. 1, Officer Riker recalled assisting in the arrest of John Edward Lee (Tr. 45-48). Officer Riker stated that he did not remember anything after returning to the scene of the fight (Tr. 49).

Officer Riker also testified that Lawrence E. Schneider, who later appeared as a Government witness in this case, had been arrested by mistake at the scene of the alleged assault. His name had been subsequently crossed-out in the arrest book (Tr. 49).

Police Department Form 163 (Statement of Facts), signed by Officer Riker, was marked as Defendant's Exhibit No. 2 (Tr. 51). Officer Riker stated that he made out the form on September 11, 1965, the same day as the alleged offense (Tr. 52). Information in this Form contradicted Officer Riker's testimony in several

particulars; e.g., the location of the arrest, the location of the alleged assault, and who Officer Riker pursued and in what direction (Tr. 51-56).

Defendant's Exhibits 4 and 4-A also indicated that the arrest took place within the tavern and that a baton was used in the alleged assault, as well as a fist (Tr. 57, 77).

Lt. Thomas F. Curtin of the D.C. Police and Fire Clinic was sworn as a witness and introduced Officer Riker's medical records (Tr. 79-81). Counsel then stipulated that medical testimony, if offered, would show that Officer Riker had received a broken jaw. (Tr. 85-90).

Officer Riker was then recalled to the witness stand and questioned concerning Police Department Form 42, Sick or Injury Report, marked as Defendant's Exhibit No. 5. This Report was prepared and signed by Officer Riker on the same day as the alleged assault. It indicated that Charles Pino did not strike Officer Riker, but that Louis struck him several times (Tr. 90-93).

Lawrence E. Schneider was sworn as the next Government witness (Tr. 94). He testified that he had been arrested inside Guy's Restaurant, contrary to the testimony of Officer Riker (Tr. 96). He stated that there was a crowd around Officer Riker, who was "getting hit." Mr. Schneider stated that Louis Pino was in this crowd but that he did not see Charles Pino (Tr. 95-99).

Joseph L. Spivacke was the next Government witness. He testified that, to the best of his knowledge, he saw hands

going toward Officer Riker, but that he did not know "whose hands were whose" (Tr. 108).

Officer John R. While of the Metropolitan Police Department was the final Government witness. He testified that Officer Riker was struck by Charles and Louis Pino (Tr. 115), but that he immediately became involved in a fight himself and did not see anything further concerning the Appellants.

On cross-examination, Officer While said he did not arrest the witness Schneider but did escort him out of the premises immediately behind Officer Riker and Louis Pino. Upon examination concerning Defendant's Exhibit No. 3 (P.D. Form 163, Statement of Facts), which was signed by him, Officer While admitted that his description of the flight of both Pinos contained in this Form was in error (Tr. 120-122). He testified that he never saw Officer Riker lose his night-stick or get pushed into the bar stools, despite the fact that he was following behind Officer Riker (Tr. 124).

At the close of the Government's case-in-chief, both Appellants moved for a judgment of acquittal which was denied (Tr. 125-127). The Court indicated, however, that:

"There are a lot of inconsistencies. I think the probative value is for the jury.... I agree with you, there are a lot of inconsistencies. It is not very clear." (Tr. 127)

The first defense witness was John E. Light, a bailbondsmen's agent. He testified that Officer Riker was unable to identify Louis Pino, who was standing next to him, when Louis Pino made his initial court appearance. (Tr. 128-130)

Charles David Green was the next defense witness. Mr. Green testified that he went out of the door of the restaurant with Charles Pino (Tr. 135, 137-138). He then saw Officer While swing at Louis Pino, who then ran from the scene (Tr. 135). Mr. Green testified that he was present during the incident in question and that neither Charles nor Louis Pino struck Officer Riker (Tr. 136).

Diane Pino, the wife of Louis Pino, then testified that she was unable to recognize her husband at the hospital on the morning of September 11, 1965, because of his severe facial injuries (Tr. 144). This was approximately at the same time that Officer Riker identified Louis Pino as his assailant.

Louis Pino then testified in his own behalf. He stated that he left the premises with Officer Riker at the Officer's request (Tr. 148). He stated that he never pushed or struck Officer Riker either inside or outside Guy's Restaurant and that, in fact, Officer While had struck him (Tr. 149-151). After having been hit, Louis Pino testified that he ran from the scene (Tr. 150). He then turned and saw Officer Riker chasing a subject named John Edward Lee, who was subsequently arrested (Tr. 150). Louis Pino later received serious head injuries in an unconnected automobile accident and was taken to D.C. General Hospital (Tr. 152).

Charles Pino was then sworn and testified that he followed his brother and Officer Riker out of the restaurant (Tr. 167). Charles Pino stated that neither he nor Louis struck Officer

Riker. He remained in the vicinity of Guy's Restaurant for some time after the fight and was approached by a police officer who told him to move his auto, but did not attempt to arrest him or question him about an assault on Officer Riker (Tr. 167, 174). He left the scene, but returned approximately one-half hour later and remained until 4:30 a.m. (Tr. 167-170, 179). He then learned that his brother had been injured in an accident and was at D.C. General Hospital. He went there and was subsequently arrested (Tr. 170, 180).

On cross-examination, Charles Pino testified that he saw Officer While strike Louis with a black-jack (Tr. 171, 179-180), whereupon Louis ran from the scene (Tr. 172). Charles Pino remained and watched the police break up the fight (Tr. 173). He also testified that he was unable to recognize his brother at the hospital because of his facial injuries (Tr. 181-182).

Nelson L. Pumphrey testified that he saw an individual, who was neither Charles nor Louis Pino, strike Officer Riker, causing him to fall to the ground and to lose his hat (Tr. 186-187, 189).

Albert Ingraham, the next defense witness, testified that he saw Charles Pino double-parked on Eighth Street near Guy's Restaurant. A police officer came over to him and told him to move away (Tr. 197-198). Mr Ingraham also saw Officer Riker with other police officers on the scene at approximately the same time (Tr. 199). Officer Riker was without his hat (Tr. 199). This was approximately one-half hour after the alleged assault took place.

David Thompson, the final defense witness, testified that he saw an officer in plain clothes hit Louis Pino (Tr. 207). He also testified that he did not see Charles or Louis Pino strike any officer (Tr. 207-208). He saw Louis Pino run from the scene, and did not see anyone pursue him (Tr. 215). Mr. Thompson testified that Charles remained standing at the scene and did not get involved in the fight (Tr. 216).

Officer Riker then testified in rebuttal that he did recognize Louis Pino at his initial court appearance and that he did not fall to the street when struck by Charles and Louis Pino (Tr. 223-224). He also testified that no one struck Louis Pino (Tr. 225). Officer While testified in rebuttal that he did not strike Louis Pino (Tr. 226).

Both the Government and the defense then rested. Motions for judgment of acquittal were made in behalf of both Charles and Louis Pino. The motions were denied (Tr. 228).

In its instructions to the jury, the Court read the statute and the remaining count of the indictment to the jury (Tr. 279-280). Instructions on presumption of innocence (Tr. 280) and reasonable doubt (Tr. 281) followed. The Court then instructed on the elements of the offense charged (Tr. 282). No instruction was given, nor was any mention made, of the element of intent.

The Court then reviewed the contentions of the Government and the defense (Tr. 284-287) and instructed on the testimony of a police officer (Tr. 287-288) and on aiding and abetting (Tr. 288-289).

No exception was taken to the instructions by either the Government or the defense (Tr. 291).

A note was received from the jury after approximately two hours deliberation, stating the following:

"If the defendants are found guilty on any one or more of the six adjectives describing the offense, are we instructed to find the defendants guilty as charged?" (Tr. 293-294)

The Court answered the question by stating that "the Government's case rests or falls on whether it has proved beyond a reasonable doubt that the defendants assaulted Police Officer Riker..." (Tr. 294).

A verdict of guilty was then returned as to both defendants (Tr. 298-302).

III

CONSTITUTIONAL PROVISIONS, STATUTES
AND RULES INVOLVED

United States Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

District of Columbia Code

Section 22-505(a)

§ 22-505. Assault on member of police force.

(a) Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with any officer or member of any police force operating in the District of Columbia while engaged in or on account of the

performance of his official duties, shall be fined not more than \$5,000 or imprisoned not more than five years or both.

Federal Rules of Criminal Procedure

Rule 7(c)

(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

Rule 29(a)

(a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

Rule 52(b)

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

IV

STATEMENT OF POINTS

1. The indictment was faulty in that it lacked the necessary clarity and specificity.

2. The indictment was faulty in that it failed to allege intent, an essential element of the crime charged.

3. The Trial Court committed plain and reversible error by failing to instruct the jury on intent, an essential element of the crime charged.

4. The Trial Court erred in denying Appellant's motion for judgment of acquittal.

SUMMARY OF ARGUMENT

1. The indictment charged that the Appellant "did assault, resist, oppose, impede, intimidate and interfere" with a police officer performing his official duties, knowing the officer to be a member of the police department. This indictment follows the words of the statute (D.C. Code § 22-505(a)). The indictment connects the several generic terms describing the crime in the conjunctive. It failed to "descend to particulars" in describing the acts charged, thereby failing to apprise the Appellant with reasonable certainty of the nature of the accusation against him. This ambiguity in the indictment also worked particular prejudice upon the Appellant by confusing the jury as to exactly what acts constituted the offense charged, particularly in light of the lack of any intimation of the essential element of intent, either in the indictment or in the charge to the jury.

2. The indictment failed to allege that the Appellant intended to assault a police officer. With this essential element of intent missing from this ambiguous indictment, it left the Government free to prove that almost any unintentional act involving a policeman could constitute the crime charged. The element of intent is one of the "essential facts constitu-

ting the offense charged." Rule 7(c), Fed. R. Crim. Pro.

3. The failure of the Trial Court to instruct the jury on, or even mention, the essential element of intent to commit the crime charged constituted plain and reversible error in this case. The failure to give this instruction removed one of the basic factual issues in this case from the jury's consideration in violation of the Appellant's basic right to trial by jury.

4. The Government's own witnesses in this case so contradicted its own evidence and theory of the case, that a reasonable mind could not fairly conclude guilt beyond a reasonable doubt. Accordingly the Trial Court erred in denying Appellant's motion for a judgment of acquittal at the close of the Government's case-in-chief and at the close of all the evidence.

VI

ARGUMENT

A. THE INDICTMENT WAS FAULTY AND APPELLANT'S MOTION TO DISMISS SHOULD HAVE BEEN GRANTED BECAUSE THE INDICTMENT FAILED TO DESCRIBE THE ACTS CONSTITUTING THE OFFENSE WITH PARTICULARITY

(With respect to this point Appellant desires the Court to read transcript pages 3-5 incl., 21-23 incl., 24-25 incl., 279-280 incl., 281-282 incl. and 293-297 incl.)

The Appellant herein was charged with and convicted of a violation of D.C. Code § 22-505(a), assault on a member of the police force. This statute reads:

"§ 22-505. Assault on member of police force.

"(a) Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with any officer or member of any police force operating in the District of Columbia while engaged in or on account of the performance of his official duties, shall be fined not more than \$5,000 or imprisoned not more than five years or both."

The first count of the indictment, under which Appellant was convicted, reads substantially the same as the statute:

"On or about September 11, 1965, within the District of Columbia, Charles Pino, aided and abetted by Louis Pino, without justifiable and excusable cause, did assault, resist, oppose, impede, intimidate and interfere with Charles R. Riker, knowing him to be a member of the Metropolitan Police Department operating in

the District of Columbia, while the said Charles R. Riker was engaged in the performance of his official duties."

The indictment was read to the jury by the Trial Court on three occasions (Tr. 3-4, 24-25, 279-280) and the statute once (Tr. 281-282). In addition, the indictment was carried into the jury room and was considered by the jury during their deliberations.

In Jackson v. United States, 121 U.S.App.D.C. 160, 161, 348 F.2d 772, 773 (1965), this Court criticized an indictment strikingly similar to the one in the instant case:

"And the indictment, which was in language similar to the language of the statute, was read and sent to the jury room. The statutory language defined several patterns of behavior as robbery in a single convoluted sentence and does not clearly set forth the elements which the Government had to prove in this case. The reading of the indictment further confused the matter, since it replaced the disjunctives in the statute with conjunctives." 1/

The Trial Court evidently had Jackson in mind at a bench conference early in the trial in this case, when the following conversation took place:

"THE COURT: They both should have been charged as principals. I indicated to the United States Attorney's Office, not only in cases like this, but where the statute makes it disjunctive, you are still using it in the conjunctive, and the Court of Appeals has called attention to that.

"This would appear it has got to be all of these, because it is in the conjunctive, and it should be 'or'. That is true in the narcotics cases too. You recall the language?

1/ This was dicta. The case was reversed on the ground that the Trial Court failed to instruct on the essential element of intent.

"MR. BLACKWELL: Yes, Your Honor.

"THE COURT: And the Court of Appeals in one of the opinions called attention to the confusion that results. The jury gets the indictment. Even though I charge them it may be either resisting or impeding or imposing (sic) or intimidating, this is in the conjunctive, according to the indictment. It has got to be all of them. They have to prove all of these.

"I am going to dismiss the second count.

"MR. NIBLACK: I will move to dismiss the entire indictment.

"THE COURT: On what basis?

"MR. NIBLACK: I feel that the wording is wrong, as Your Honor stated.

"THE COURT: No. As long as I charge the jury properly there is no basis for that." 2/

Both the statute and the indictment contain several generic terms describing acts forbidden by the statute: assault, resist, oppose, impede, intimidate, interfere.

The legal definition of assault has been considered by this Court. Beausoliel v. United States, 71 U.S.App.D.C. 111, 107 F.2d 292 (1939); Guarro v. United States, 99 U.S.App.D.C. 97, 237 F.2d 578 (1956).^{3/} The five other terms used in the indictment are not legally so well defined. Even in general use, their meaning is quite broad. Webster's New Twentieth Century Dictionary, unabridged (2d ed. 1964) defines them as follows:

RESIST: (OFr. resister, from L. resistere, to stand back, to resist; re-, back, and sistere, to set, to stand back.)

2/ It would, of course, be impossible for the Court to amend a faulty indictment through instructions to the jury. Russell v. United States, 369 U.S. 749, 770-71 (1962); Ex Parte Bain, 121 U.S. 1 (1886); Stirone v. United States, 361 U.S. 212 (1960).

3/ Had the statute, or at least the indictment, been restricted solely to the word "assault" this issue need never have arisen. This is particularly true in view of the "plain, concise and definite" admonition of Rule 7(c), F.R.Crim.Pro.

1. to stand against; to withstand; to oppose; to fend off; to withstand the action of.
2. to oppose actively; to strive, fight, argue or work against; to endeavor to counteract, defeat or frustrate.
3. to keep from yielding to, being affected by, or enjoying; as she tried to resist temptation.
4. to be disagreeable or distasteful to; to offend.

Syn. -- withstand, oppose, hinder, check, thwart, baffle, disappoint, obstruct.

OPPOSE: (ME. opposen; OFr. opposer, from poser, to put in position; L. pausare, to pause, confused in meaning by association in LL. with positus, pp. of ponere, to place, put.)

1. to place in front; to offer to full view.

* * *

2. to set against; to place as an obstacle; to put in opposition, with a view to counterbalance or countervail.

* * *

3. to act against; to resist, by physical force, by arguments, or other means; to withstand; to act as an opponent to; to object to.

* * *

Syn. -- combat, withstand, resist, contradict, deny, oppugn, contravene, check, obstruct.

IMPEDE: (L. impedire, to entangle, ensnare, lit., to hold the feet; in, in, and pes, pedis, foot.) to hinder; to stop in progress; to obstruct; to retard; as, to impede the progress of troops.

Syn. -- hinder, obstruct, check, delay, prevent, embarrass, retard, fetter, hamper.

INTIMIDATE: (LL. intimidatus, pp. of intimidare, to make afraid; L. in, in, and timidus, afraid, fearful.)

1. to make timid, to make afraid; overawe.
2. to force or deter with threats of violence; to cow.

INTERFERE: (ME. enterferen, OFr. entreferir, to exchange blows; L. inter, between, among, and ferire, to strike.)

1. to come in or between for some purpose; to intervene.
2. to intermeddle; to enter without invitation or right into the concerns of others.
3. to clash; to come in collision; to be in op-

position; as, the claims of two nations may interfere.

4. in farriery, to strike the hoof or shoe of one hoof against the fetlock of the opposite leg.

5. in physics, to act reciprocally upon each other so as to modify the effect of each by augmenting, diminishing, or nullifying it: said of waves of light, heat, sound, etc.

6. in patent law, to claim priority for an invention, as when several applications for its patent are pending.

7. in football, to act defensively in guarding the player who has the ball; also to hinder illegally the player who is about to catch a pass.

8. in radio, to create interference in reception.

These words, subject to many different definitions and interpretations, cannot, standing by themselves in an indictment without additional particularization and without any allegation of intent, support a conviction of assault.

This problem was considered by the Supreme Court in United States v. Cruikshank, 92 U.S. 542 (1875), wherein it was held that:

"It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species, -- it must descend to particulars.'" Id. at 558.

See also United States v. Lamont, 18 F.R.D. 27, 31 (D. S.D. N.Y. 1955).

It is not difficult to imagine acts that would fall within the purview of the indictment in this case that would pro-

duce absurd conclusions; e.g., an individual might unintentionally block the path of a policeman chasing a fugitive -- under the terms of this indictment he would have "impeded" the officer and thus would be guilty of assault.

In the instant case, such suppositions can strike appallingly close to home. The brother of the Appellant herein, Louis Pino (Appellant in companion case No. 19,980), by his own testimony stated that he ran from the arresting officer. This could be construed by a jury to be "interference" with an arrest and, under the terms of the indictment, an assault.

Dismissing an indictment charging a violation of Treasury Department regulations, the District Court stated in United States v. Goldberg, 123 F.Supp. 385, 388 (D. D. Minn. 1954), that an indictment is "not sufficient if by its generality it may embrace acts which it was not the intent of the statute to punish." See 42 C.J.S. Indictments and Informations § 139(h); United States v. Metzdorf, 252 F. 933 (D. D. Mont. 1918).

In Standard Oil Company of Texas v. United States, 307 F.2d 120 (5th Cir. 1962), the Court reversed for failure of the District Court to dismiss certain counts of the indictment. The Court stated:

"While it is true that indictments are to be construed in a common sense way, where one is subject equally to one of two interpretations, one of which states an offense and the other which does not, the indictment is insufficient since there is no assurance that the Grand Jury would have returned the indictment had the words

been employed in the sense necessary to sustain the conviction." (cases cited) Id. at 130.

The confusion resulting from the vaguely worded indictment in this case is demonstrated by the reaction of the jury during their deliberations. A note was sent out from the jury room with the following query:

"If the defendants are found guilty on any one or more of the six adjectives describing the offense, are we instructed to find the defendants guilty as charged?" (Tr. 293-294)

The Trial Court responded with the following answer to the jury:

"You will recall, members of the jury, that among other things in my charge, I instructed you as follows:

"The theory of the Government's case is that the defendants violated the provisions of the law, which I read to you, by the commission of an assault on Police Officer Riker while he was in uniform and in the performance of his official duties as such officer in the District of Columbia.

"Consequently, the Government's case rests or falls on whether it has proved beyond a reasonable doubt that the defendants assaulted Police Officer Riker as claimed by the Government under the sworn testimony in this case.

"If you find that the Government has failed to establish beyond a reasonable doubt that said assault took place, by either of these defendants, then your verdict should not be guilty as to both defendants.

"On the other hand, if you find that the Government has proved beyond a reasonable doubt that either or both of the defendants committed this assault as claimed by the Government, your verdict

should be accordingly.

"Does that answer your question?

"THE FOREMAN: Yes, sir." (Tr. 293-295)

After the jury returned to the jury room, the following colloquy took place between the Court and counsel for the Government:

"THE COURT: It is hard to figure out any case where there could be any impeding or resisting or opposing or interference, without some actual assault. It doesn't have to be a battery, but at least there can be an assault. But obviously, in this case, Mr. Blackwell, you relied upon the fact that an assault took place?

"MR. BLACKWELL: I take the position, Your Honor, an assault took place, yes. But I also take the position included in that assault was the impeding the arrest, because the man was arrested when --

"THE COURT: But if an assault didn't take place, there can't be a verdict of guilty. That is what I just told the jury." (Tr. 296-297).

The Supreme Court noted such situations in Russell v. United States, 369 U.S. 749, 766 (1962):

"A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmation of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture."

The Court went on to state that such an indictment leaves

"the prosecution free to roam at large -- to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." Id. at 768.

B. THE INDICTMENT WAS FAULTY IN
THAT IT DID NOT ALLEGE INTENT,
AN ESSENTIAL ELEMENT OF THE
CRIME OF ASSAULT

(With respect to this point Appellant desires the Court to read transcript pages 3-5 incl., 21-23 incl., 24-25 incl., 278-280 incl., 281-282 incl. and 293-297 incl.)

Neither the statute nor the indictment, which follows the words of the statute, make any reference whatsoever to intent to commit an assault.

It has long been the rule, both in this and other jurisdictions, that intent is an essential element of a criminal assault. Patterson v. Pillans, 43 App.D.C. 505 (1915); Beausoliel v. United States, supra, and cases cited therein. See also 1 Wharton's Criminal Law (12th ed. 1957) § 330 ("There must be a present intention of making a bodily contact or of inflicting personal injury or the person assaulted.").

A statute alone need not state each and every element of the crime proscribed. It is required only to be sufficiently explicit to inform those subject to it in terms so that men of common intelligence need not necessarily guess at its meaning and differ as to its application. Connally v. General Construction Co., 269 U.S. 385, 391 (1926); Lanzetta v. State of New Jersey, 306 U.S. 451, 453 (1939); Scarbeck v. United States, 115 U.S.App.D.C. 135, 145, 317 F.2d 546, 556 (1962), cert. den. 374 U.S. 856, rehearing den. 375 U.S. 874. The statute must convey "sufficiently definite warning as to the proscribed

conduct when measured by common understanding and practices...."

United States v. Petrillo, 332 U.S. 1, 7-8 (1947); Roth v.

United States, 354 U.S. 476, 491 (1957). ^{4/}

Where, as here, the statute does not include one of the essential elements of assault, an indictment must go beyond the words of the statute to allege this element. The Supreme Court has long recognized the necessity of this practice. In United States v. Carl, 105 U.S. 611 (1881), it was held that:

"In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent." Id. at 612-613.

See also United States v. Hess, 124 U.S. 483 (1888).

In Russell v. United States, supra, the Supreme Court reasserted the criteria by which the sufficiency of an indictment is measured:

"(F)irst, whether the indictment 'contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet,' and, secondly, 'in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.'" 369 U.S. at 763-64

^{4/} Appellant does not concede the constitutionality of the statute (D.C. Code § 22-505). The inclusion of terms that may or may not constitute assault could well support a direct attack on the constitutionality of the statute.

The Fifth Circuit has recently held that an indictment charging a violation of 18 U.S.C. § 912, 62 Stat. 742 (impersonation of officer or employee of the United States) and not alleging the essential element of intent did not comply with the first criterion of Russell, supra. Honea v. United States, 344 F.2d 798 (5th Cir. 1965):

"One of the laudable reforms of the Federal Rules of Criminal Procedure was to eliminate the necessity for much of the cumbersome claptrap which typically encased the common law indictment. Yet the substantive safeguards to those charged with serious crimes cannot be eradicated under the guise of technical departures from the rules." 344 F.2d at 804.

C. THE FAILURE OF THE TRIAL COURT
TO GIVE ANY INSTRUCTION TO THE
JURY ON INTENT CONSTITUTED PLAIN
AND REVERSIBLE ERROR

(With respect to this point Appellant desires the Court to read transcript pages 272-292 incl. and 293-297 incl.)

In its instructions to the jury, the Trial Court failed to make any mention whatsoever of intent, an essential element of the crime of assault.

This failure was patently prejudicial in light of the vague wording of the indictment and the fact that the indictment was also lacking in any allegation of intent.

After reading the words of D.C. Code § 22-505(a) to the jury the Trial Court continued the charge on this offense as follows:

"Now in connection with this charge, members of

the jury, I want to explain the elements to you briefly. The Government must first prove beyond a reasonable doubt that the defendants assaulted the police officer who has testified here, Mr. Riker.

"Assault is defined by law as an unlawful attempt or effort with force and violence to do injury to the person of another, coupled with the present apparent possibility of carrying out such an attempt.

"The theory of the Government's case is that the defendants violated the provisions of this law which I have just read to you by the commission of an assault on a police officer while he was in uniform, Officer Riker, and in the performance of his official duties as such police officer in the District of Columbia.

"Consequently, the Government's case rests or falls on whether it has proved beyond a reasonable doubt that the defendants assaulted Police Officer Riker. If you find the Government has failed to establish beyond a reasonable doubt that said assault took place by either of these defendants, then your verdict should be not guilty as to both defendants.

"I want to further outline the other elements of the charge. First, as I indicated to you, the Government must prove to you beyond a reasonable doubt that there actually was an assault on Police Officer Riker. I have defined assault to you.

"Secondly, the Government must prove under this provision of the code beyond a reasonable doubt that there was in this case no justifiable and excusable cause for the assault on the police officer, which it alleged took place.

"Third, you must find that the Government has proved beyond a reasonable doubt that Officer Charles R. Riker was at the time of the assault upon him, which you find to have been committed, an officer or a member of a police force operating in the District of Columbia.

"Forth, the Government must prove beyond a rea-

sonable doubt that Charles R. Riker was at the time of the assault upon him engaged in the performance of his official duties; and

"Fifth, you must find that the Government has proved beyond a reasonable doubt that the defendants knew that Charles R. Riker was an officer or member of a police force operating in the District of Columbia, and that they knew at the time of said assault, which you find they committed against him, if you do so find, that he was engaged in the performance of his official duties."
(Tr. 281-284)

This Court in Jackson v. United States, supra, has held that an instruction on general intent in a robbery case, when an instruction on specific intent was required, was plain error under Rule 52(b), Fed. R. Crim. Pro., and required reversal.

It is clear that intent is an essential element of the crime of assault. Patterson v. Pillans, supra; Beausoliel v. United States, supra.

It is the customary practice in the courts in this jurisdiction to give an instruction on intent for the offense of assault on a police officer (D.C. Code § 22-505) In Criminal Jury Instructions for the District of Columbia, published by the Junior Bar Section of the Bar Association of the District of Columbia (1966), the sample instruction for an offense involving a violation of D.C. Code § 22-505 reads as follows:

"The essential elements of the offense of assault on a police officer, each of which the Government must prove beyond a reasonable doubt, are:

"(1) That the defendant assaulted, resisted,

opposed, impeded intimidated or interfered with the complainant; and

"(3) That, at the time the defendant did so, the complainant was engaged in or an account of the performance of his official duties; and

"(4) That, at the time the defendant did so, he knew that the complainant was a member of a police force operating in the District of Columbia; and

"(5) That, at the time the defendant did so, he intended to assault, resist, oppose, impede, intimidate, or interfere with the complainant; and

"(6) That the defendant did so without justifiable and excusable cause. (emphasis added) 5/

* * *

In Morrisette v. United States, 342 U.S. 246 (1952), the necessity of bringing the element of intent before the jury was directly stated:

"The purpose and obvious effect of doing away with the requirement of a guilty intent is to east the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common law crimes on judicial initiative." Id. at 263

5/ The members of the committee of the Junior Bar Section that compiled and edited the Criminal Jury Instructions for the District of Columbia made the following statement in the Foreword to the volume:

"In formulating these instructions, we have relied upon the relevant appellate decisions, principally those of the United States Supreme Court and the United States Court of Appeals for the

The Morissette Court went on to hold that:

"Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury." 342 U.S. at 274.

No exception was taken at trial by counsel for either defendant to the lack of an instruction on intent.^{6/} It has been held, however, that an omission of an essential instruction, such as herein, falls within the plain error provisions of Rule 52(b) of the Federal Rules of Criminal Procedure. Jackson v. United States, supra; Screws v. United States, 325 U.S. 91 (1945); McDonald v. United States, 109 U.S.App.D.C. 98, 284 F.2d 232 (1960); Jones v. United States, 113 U.S.App.D.C. 352, 308 F.2d 307 (1962).

^{5/} cont. District of Columbia Circuit, and on instructions in current use in criminal cases by Judges of the United States District Court for the District of Columbia. We have also had access to instructions prepared for use in individual cases by members of the United States Attorney's Office, the Legal Aid Agency, and the Legal Internship Program of Georgetown Law Center."

^{6/} Assigned counsel for Appellant in this appeal was also assigned counsel for the Appellant at trial. The Court's failure to charge the jury on this crucial element of the offense passed unnoticed by counsel at trial.

D. THE TRIAL COURT ERRED IN DENY-
ING APPELLANT'S MOTIONS FOR
JUDGMENT OF ACQUITTAL 7/

(With respect to this point Appellant desires the Court to read transcript pages 26-40 incl., 45-78 incl., 90-124 incl., 128-146 incl., 147-165 incl., 166, 167-220 incl., 221-227 incl. and 228, plus defendants' exhibits 1 through 7.)

In considering a motion for judgment of acquittal, a Trial Court must "assume the truth of the Government's evidence and give the Government the benefit of all legitimate inferences to be drawn therefrom," and "if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted." Curley v. United States, 81 U.S.App.D.C. 389, 160 F.2d 229 (1947), cert. den. 334 U.S. 853, rehearing den. 335 U.S. 839; Cephus v. United States, 117 U.S.App.D.C. 15, 324 F.2d 893 (1963); Kemp v. United States, 114 U.S.App.D.C. 88, 311 F.2d 774 (1962); Hiet v. United States, ___ U.S.App.D.C. ___, ___ F.2d ___ (No. 19,716, decided June 22, 1966); United States v. Bingaman, 240 F.Supp. 186 (D. D.C. 1965).

The evidence in this case from the Government's case-in-chief could not lead a reasonable mind to "fairly conclude guilt beyond a reasonable doubt." Nearly every essential element of the Government's case was contradicted by its own evidence or from reports written on the day of the alleged crime by the

7/ The Appellant Charles Pino adopts the argument set forth in appeal No. 19,980 on this point.

two police officers involved in the case. Other circumstantial evidence from the Government's case casts doubt upon the veracity of their witnesses. Three of the four major Government witnesses admitted they were "dazed" at the time the incident in question took place (Tr. 29, 109, 122). When Appellant moved for a judgment of acquittal at the close of the Government's case-in-chief, the Trial Court said:

"There are a lot of inconsistencies. I think the probative value is for the jury.... I agree with you, there are a lot of inconsistencies. It is not very clear." (Tr. 127)

Despite the fact that the Trial Court obviously had a reasonable doubt as to the guilt of the defendants, the motions for judgment of acquittal were denied.

VII

CONCLUSION

The cumulative effect of error in this case requires that the Judgment of the District Court be reversed and the case remanded with instructions to dismiss the indictment.

Respectfully submitted,

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REPLY BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 19 1966

No. 19,979

Nathan J. Paulson
CLERK

CHARLES PINO,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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September 8, 1966

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THE INDICTMENT FAILED TO CHARGE
AN OFFENSE AND SHOULD HAVE BEEN
DISMISSED

Because of its ambiguous language and its failure to allege an essential element of the crime, the indictment failed to charge an offense.

Under Rule 12(b)(2), F.R.Cr.P., this defect could have been noticed by the Court at any time "during the pendency of the proceeding." It has been held that such defects can be considered by the courts after verdict or even for the first time on appeal. See e.g., Finn v. United States, 256 F.2d 304 (4th Cir. 1958); United States v. Solomon, 216 F.Supp. 835 (D. S.D. N.Y. 1963).

Appellee asserts that the Appellants must rely on the plain error rule in attacking the sufficiency of the indictment. This is incorrect. Appellants made timely objections at trial which were accepted and considered by the Court (Tr 22).

INTENT IS AN ESSENTIAL ELEMENT
OF THE CRIME OF ASSAULT ON A
POLICE OFFICER AND MUST BE AV-
ERRED IN THE INDICTMENT AND IN-
CLUDED IN THE CHARGE TO THE JURY

The crime of assault on a police officer requires a specific intent to inflict injury upon a particular class of individual. It is necessary for the defendant to have knowledge that the individual assaulted is a police officer. The fact that scienter is required indicates that considerably more than a vague general in-

tent is required as an element to the offense.

It has been recognized that an indictment must allege all elements of the crime charged. The Supreme Court held in Pettibone v. United States, 148 U.S. 197, 202 (1893), that:

"The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted such omission cannot be supplied by implication. The charge must be made directly and not inferentially or by way of recital."

In Pettibone, the defendants were charged with obstructing and impeding a witness or officer of a court of the United State by force or threats from the discharge of his duty. The case involved a union dispute with a mining company. The defendants had attempted to force employees of the company to abandon work contrary to the terms of an injunction.

The Court made the following distinction between crimes in which there must be a specific intent to violate the statute and crimes in which the violation of the statute follows as a natural and probable result of a wrongful act:

"It is insisted, however, that the evil intent is to be found, not in the intent to violate the United States statute, but in the intent to commit an unlawful act, in the doing of which justice was in fact obstructed, and that, therefore, the intent to proceed in the obstruction of justice must be supplied by a fiction of law. But the specific intent to violate the statute must exist to justify a conviction, and this being so, the doctrine that there may be a transfer of intent in regard to crimes flowing from general malevolence has no

applicability. 1 Bish.Cr.Law, § 335. It is true that if the act in question is a natural and probable consequence of an intended wrongful act, then the unintended wrong may derive its character from the wrong that intended; but if the unintended wrong was not a natural and probable consequence of the intended wrongful act, then this artificial character cannot be ascribed to it as a basis of guilty intent. The element is wanting through which such quality might be imparted." 148 U.S. at 207. 1/

This Court recognized the distinction in Parker v. United States, ___ U.S.App.D.C. ___, 359 F.2d 1009 (1966), which involved a charge of assault with a deadly weapon.

"Since the statute does not require that the weapon be used with a conscious purpose to inflict injury, we decline to read this requirement into it. The potential for serious bodily harm through the reckless use of dangerous weapons is as substantial as it is obvious. Use of such weapons, even there is no specific intent to employ them to inflict injury, is invariably fraught with the possibility of dangerous consequences. Imposing more serious sanctions for assault is a practical recognition of the additional risks posed by the use of the weapon. 'The gist of the crime is found in the character of the weapon with which the assault is made'". (emphasis Court's) 359 F.2d at 1012.

The Court went on to note that the District of Columbia assault with a deadly weapon statute (D.C. Code § 22-502) was grouped with other assault-based crimes that require a particular intent. Although the Court did not specifically include D.C. Code § 22-505 among those crimes, there can be little doubt that the crime of

1/ See 6 C.J.S., Assault and Battery § 63, p. 919.

on a police officer contains the same elements as the as the crimes the Court distinguished from assault with a deadly weapon. 359 F.2d at 1013, n. 7.

The crimes of assault on a police officer is not purely statutory as Appellee would have it. The gist of the crime is common law assault. The added element requires only scienter that the subject of the assault is a police officer.

Appellee cites United States v. Behrman, 258 U.S. 280 (1922), and Braswell v. United States, 224 F.2d 706 (10th Cir. 1955), cert. denied 350 U.S. 845, for the proposition that no averment of intent is necessary in the indictment when this element is not included in the statute or when only a general intent is required. Both cases are distinguishable.

Behrman involved a violation of the Anti-Narcotic Act of December 14, 1914, (38 Stat. 785), making it a crime to sell certain drugs without a written order on an official form. The defendant was a physician who prescribed drugs to an addict who did not require the drugs for treatment of an illness. The indictment did not allege intent to violate the statute, and much of the discussion in the case involved the discretion of a physician in treating a patient. The case did not involve any element of a common law crime and the offense was purely statutory in nature.

Similarly, the offense in Braswell, supra, involved interstate transportation of a firearm after conviction of a crime of violence (15 U.S.C. § 902e). The distinction made by the Su-

preme Court in Pettibone v. United States, supra, applies to both of these cases.

The failure of the Court to make any mention whatsoever of the element of intent in the charge to the jury is plain error. Appellee asserts that it was not necessary to instruct on this element because the Appellants did not raise the issue of unintentional assault. To the contrary, if the Appellants had offered no testimony or evidence and had rested on the Government's case, it would still have been necessary for the Court to instruct the jury on each and every element of the crime charged.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Reply Brief for Appellant upon the Office of the United States Attorney, United States Court House, Washington, D.C., this 9th day of September, 1966.

David C. Niblack

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BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,979

CHARLES PINO, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 19,980

LOUIS PINO, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 11 1966

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CLERK

Cr. No. 1068-65

QUESTIONS PRESENTED

1. Where neither appellant alleged or demonstrated any prejudice in the preparation of his defense, where neither raised pretrial objections to the indictment or requested a bill of particulars, and where one appellant's suggestion that half of the two-count indictment was redundant resulted in a dismissal of one count, may they now challenge the remaining count on grounds (1) that it charged one appellant as an aider and abettor rather than a principal; (2) that it failed to aver "intent" in a general intent offense, and (3) that it paraphrased statutory language, which included all elements of the offense in language perfectly intelligible to the layman?

2. Was the evidence, which was consistent with regard to all of the elements of the offense, sufficient to permit the case to go to the jury?

3. Where Government counsel's closing argument contained only one misstatement of fact, which was corrected by defense counsel and nonprejudicial, may appellants now claim plain error affecting their substantial rights?

4. After expressing complete satisfaction with the instructions, may appellants now challenge them on the sole ground that the judge failed to charge the jury on "intent" which is not a major element of the offense and which was never in issue?

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,979

CHARLES PINO, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 19,980

LOUIS PINO, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellants, brothers Louis and Charles Pino, were tried together before a jury and found guilty of assaulting a

policeman. Charles received a one to three year prison sentence and Louis was sentenced under the Youth Correction Act, 18 U.S.C. § 5019(b). Their appeals from this conviction have been consolidated, and they challenge the sufficiency of the Government's evidence, the indictment, and the instructions.

A riotous, drunken time was being had by all patrons of a tavern named Guy's in southeastern Washington during the early morning hours of September 11, 1965. Officers Riker and Mickliss of the Metropolitan Police came on duty at midnight and stopped at Guy's to check for possible trouble about an hour later. A little after one o'clock, the officers arrested one customer for being disorderly after he swept a bunch of beer bottles off a table. A weapon was found during a search of that person, and Officer Mickliss took him down to the precinct for booking. He also took one of the prisoner's friends, John Edward Lee, for protesting the arrest too vehemently. (Tr. 26, 33-35, 46-47, 61-62.)

Officer Riker, who was fully uniformed, returned alone to Guy's and joined a plainclothesman, John R. While, at the entrance to the dancing area. Suddenly, a fight broke out on the dance floor between appellant Louis Pino and Lawrence Schneider. The two policemen moved in quickly to stop the fight and then proceeded to take the combatants outside. Riker took Louis Pino and While took charge of Schneider. (Tr. 27, 63-64, 96, 101, 113, 134-35, 148.) As he followed Louis Pino toward the door, Riker's baton swung against a bar stool and fell out of its case to the floor. When he bent over to pick it up, Louis gave him a shove into the stool. Leaving his baton where it lay, Riker chased after Louis who was fleeing toward the front door. Just as Louis reached the outer door, Riker caught him and placed him under arrest. Officer While saw none of this action because he was talking to Schneider and paying little attention to Riker and his charge. However, While and Schneider came out of the front door in time to see the charged assault. (Tr. 27-28, 54, 102, 114-15, 124.)

Riker arrested Louis Pino for disorderly conduct—the arrest having been precipitated by the pushing of Riker rather than the initial fight—and was struggling with Louis against the outside wall of Guy's. Quite a few customers followed them outside and a crowd had formed in front of the door. Then Louis' brother (and co-appellant), Charles Pino, came up behind Officer Riker, grabbed him, swung him partially around, and slugged him in the back of his left jaw. (It was stipulated below that Riker suffered a cracked jaw.) As Riker's face swung around from the blow, brother Louis got into the act and socked Riker straightaway in the mouth. (Tr. 29-30, 52-53, 56, 66, 78, 89-90, 95, 103, 104, 106-08, 113, 115.)

Officer While and Schneider saw all of this (as, of course, did Riker), but While was prevented from assisting Riker because the crowd interfered and began to pummel him. While recalled nothing of what happened to the Pino brothers after the assault; however, Riker and others testified that Charles disappeared into the crowd while Louis fled up the street. (Tr. 69, 72, 116.)

Riker and a bystander chased Louis about two and one-half blocks, but Riker was feeling the effects of his beating by then and was unable to continue the pursuit. Instead he returned to a call-box, asked for help, and he could remember nothing more. Apparently, Riker did get back to Guy's where a regular donnybrook had developed. One of the crowd had recovered Riker's baton from the barroom floor and was using it in the free-for-all. When police reinforcements arrived on the scene, Riker was discovered unconscious on the ground, and While was nursing a black eye. The police broke up the melee and took control of the situation. (Tr. 29, 49, 68, 70, 104, 108.)

Riker recovered consciousness at the precinct, where he and While rectified the mistaken arrest of Schneider, the original dance floor combatant, before going to the clinic. After treatment, Riker was preparing to go home when he learned that Louis Pino had been hospitalized following

an automobile accident. Riker and While went immediately to D.C. General, where they first ran across Charles Pino, whom they arrested. Then they went inside and identified Louis Pino on the emergency table. Glass fragments were being picked out of Louis' face, which was bloody but unbandaged. Louis was arrested later with a warrant. (Tr. 37-38, 50, 74, 222.)

STATUTE AND RULES INVOLVED

Title 22, District of Columbia Code, § 505, provides in pertinent part:

(a) Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with any officer or member of any police force operating in the District of Columbia while engaged in or on account of the performance of his official duties, shall be fined not more than \$5,000 or imprisoned not more than five years or both.

* * * *

Rule 7, Federal Rules of Criminal Procedure, provides in pertinent part:

* * * *

(d) *Surplusage*. The court on motion of the defendant may strike surplusage from the indictment or information.

* * * *

(f) *Bill of Particulars*. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

Rule 12, Federal Rules of Criminal Procedure, provides in pertinent part:

* * * *

(b) * * *

(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

* * * *

Rule 52, Federal Rules of Criminal Procedure, provides in pertinent part:

* * * *

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

SUMMARY OF ARGUMENT

I

Any challenges to the indictment are inappropriate on appeal, because neither appellant presented any objections to it prior to trial, 12(b)(2), F.R.Cr.P., and neither requested a bill of particulars, 7(f), F.R.Cr.P. Moreover, neither has demonstrated or alleged any trial prejudice. Finally, no objections were entered to any of the present issues on appeal, so both appellants must rely on the plain error rule, 52(b), F.R.Cr.P., in any consideration of their challenges by this Court.

A plain reading of the count remaining after the trial court dismissed the second count of the indictment clearly charges Louis Pino with a crime—aiding and abetting his

brother in an assault on a policeman. In any event, Louis has waived any technical challenges because he suggested the dismissal of the second count as "redundant" and failed to object to the remaining count.

The statutory provision, 22 D.C. Code § 505, makes no mention of "intent" so it was not required in the indictment. Also, assault is a "general intent" crime, so intent need not be averred in the indictment. Paraphrasing statutory language in an indictment is generally permissible unless an element is missing from the statute, unless the words of the statute need clarification, or unless some specific act must be averred to preclude double jeopardy. But none of these exceptions were present in this case, so the phraseology of the indictment was properly set in the statutory language.

II

Even the uncorroborated testimony of Officer Riker—the assault victim—would have been sufficient to take the case to the jury. But his testimony *was* corroborated by two other eyewitnesses to the assault. While inconsistencies existed, none went to any of the elements of the charged offense, so the evidence was sufficient.

III

Government counsel's closing arguments were all based on facts in the record or were nonprejudicial to appellants. The only misstatement was corrected by defense counsel in *his* closing argument, and the judge cautioned the jury to adhere to its own recollection of the evidence. Moreover, that misstatement went to the issue of Officer Riker's identification of Louis Pino, which was sufficiently corroborated by other witnesses, so there was no prejudice. All other challenged remarks were based on evidence in the record and none were considered so improper as to warrant an objection by either appellant.

IV

Appellants belatedly challenge the instructions to which they both expressed complete satisfaction by asserting error in the trial judge's failure to instruct the jury on "intent." But the statute under which appellants were convicted makes no mention of intent. Intent is a subsidiary element of assault, which is an element of the charged crime, but there was never any issue below as to whether the assault on Officer Riker might have been accidental or unintentional, so there was no need to instruct on intent.

ARGUMENT

I. The indictment properly charged both appellants.

(Tr. 21-22, 293-97)

A two-count indictment was handed down by the grand jury in this case:

Count One: On or about September 11, 1965, within the District of Columbia, Charles Pino, aided and abetted by Louis Pino, without justifiable and excusable cause, did assault, resist, oppose, impede, intimidate and interfere with Charles R. Riker, knowing him to be a member of the Metropolitan Police Department operating in the District of Columbia, while the same Charles R. Riker was engaged in the performance of his official duties.

Count Two: On or about September 11, 1965, within the District of Columbia, Louis Pino, aided and abetted by Charles Pino, * * * (same as first count).

This indictment was not challenged by either appellant prior to their trial,¹ nor was a bill of particulars re-

¹ Rule 12(b)(2), F.R. Crim. P., precludes most of appellants' challenges to this indictment. It provides in pertinent part:

"... [O]bjections based on defects ... in the indictment ... may be raised only by motion before trial. * * * Failure to present any such ... objection ... constitutes a waiver thereof ..."

quested by either.² Neither appellant has claimed or demonstrated any prejudice in the preparation of his defense, and neither asserts that he did not know the crime with which he was charged. Indeed, the exactitude with which their defenses met the Government case would belie such contentions. The only objection to the indictment raised by either appellant went to the use of the disjunctive, "or" (Tr. 22), and that issue was rejected again by this Court in a recent decision. *Morrison v. United States*, No. 19325, decided July 13, 1966. Thus for all remaining challenges to the indictment, both appellants must necessarily rely on the "plain error rule," 52(b), F.R.Crim.P.

Just before the first witness was called, Louis Pino's attorney suggested to the court that the two counts of the indictment were redundant, whereupon the judge dismissed the second count on the ground that it was superfluous, i.e., the first count charged Louis as an aider and abettor, which was tantamount to charging him as a principal (Tr. 21-22).³ See 22 D.C. Code § 105. For the first time on appeal, Louis now challenges the remaining count, claiming that the clause, "aided and abetted by Louis Pino," only describes the manner of Charles' assault and not a crime by Louis.⁴

It is regrettable that any action was taken by the trial court with regard to the original indictment, which clear-

² Rule 7(f), F.R.Crim.P.

³ This action by the court apparently was taken pursuant to Rule 7(d), F.R.Crim.P. which permits a court to strike surplusage from an indictment. Technically, the action was not valid because it was not pursuant to a "motion of the defendant" as required by the rule.

⁴ Louis also argues that the language of Count One was such that he could not be expected to prepare a defense for the charge, and he now contends that the court's action constituted judicial amendment of an indictment. The facts do not support these contentions. The grand jury indicted him both as a principal and as an aider and abettor, so he was able to prepare a defense for both charges, which he did. The court's action did not change any charge; it left him charged with the same offense. Thus the only question is whether the phraseology of the first count is sufficient to charge Louis with a crime.

ly charged each appellant as a principal and apprised each that he might face a Government case based upon an aiding and abetting theory. If anything had to be stricken, it would have been better to strike the two clauses referring to aiding and abetting as surplusage pursuant to Rule 7(d), F.R.Crim.P. This would have left each of the brothers charged as principals in separate counts. It is clear from the record that the trial judge intended for each of the brothers to be charged as principals (Tr. 21-22), just as it is apparent that all of the trial participants so interpreted the remaining count.⁵ In effect, appellant Louis Pino has waived any possible objection to the remaining count by first suggesting to the trial court that the second count be dropped as redundant and then by failing to object until appeal. Cf. *United States v. Visconti*, 261 F.2d 427 (2d Cir.), cert. denied, 359 U.S. 954 (1958). And he may not wait until appeal before attacking his indictment for mere technicalities and a strained interpretation of its language. *Hagner v. United States*, 285 U.S. 427 (1932); *Cratty v. United States*, 82 U.S. App.D.C. 236, 163 F.2d 844 (1947). Even if this Court should entertain the issue, a plain reading of the first count clearly charges Louis Pino with a crime—aiding and abetting his brother's assault on a policeman.

Appellant Charles Pino challenges the indictment on the ground that it fails to mention an essential element of the crime, to wit, intent. He does admit that "intent"

⁵ Louis also challenges the indictment on grounds that 22 D.C. Code § 105 specifies that aiders and abettors "shall be charged as principals." His theory is that, after Count Two was dismissed, he was no longer charged as a principal. He takes an entirely too formalistic view toward the language of the statute, which appellee reads as meaning that an aider or abettor is responsible for an offense *as if he were* the principal. To hold that § 105 requires in all cases that an indictment charge an aider and abettor as a principal would violate one cardinal principal of an indictment, namely, that an accused be apprised of the nature of the offense with which he is charged. An accused should know whether the Government's theory is aiding and abetting so he can better formulate his defense.

is not a statutory element of the charged offense (Br. 25), which is true. 22 D.C. Code § 505. The Supreme Court has spoken directly to this point. "If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent." *United States v. Behrman*, 258 U.S. 280, 288 (1922). A possible exception to this rule is where the charged offense requires specific intent, but this Court has made it very clear that assault is a general intent crime. See *Parker v. United States*, — U.S. App.D.C. —, 359 F.2d 1009 (1966). Where only general intent is required, no averment is necessary in the indictment. *Braswell v. United States*, 224 F.2d 706, 709 (10th Cir.), *cert. denied*, 350 U.S. 845 (1955).

Both appellants belatedly challenge the use of statutory language in the indictment, but it is clear that such paraphrasing of the statute is permissible in ordinary situations unless some element of the crime is missing in the statute. *United States v. Bachman*, 164 F.Supp. 898 (D.C.D.C. 1958). Furthermore, the record indicates that the Government tried this case solely on the basis that an assault was actually committed by both appellants, and the judge so instructed the jury (Tr. 293-97). So the verbs borrowed from the statute (i.e., "resists, opposes, impedes, intimidates, or interferes") were mere surplusage as far as the jury was concerned. Even if they were considered by the jury, the meaning of these verbs is clear to the layman and, apparently, to both appellants, who failed to challenge them below.

Other arguments regarding alleged errors in the indictment are too insubstantial to warrant separate consideration here. It will suffice for these contentions to point out only that both appellants presented defenses which reflected complete understanding of the charged offense, neither had any complaints about the indictment until they decided to appeal their convictions, and there is no possibility that either will be subject to double jeopardy due to any vagueness in the indictment.

II. The evidence was sufficient to permit the case to go to the jury.

(Tr. 29, 103, 106-08, 115)

Both appellants try to sell—second-hand—to this Court the same arguments which the jury refused to buy when it returned guilty verdicts. Looking at the evidence most favorable to the Government, the following case was established:

Everyone agreed that Louis Pino was involved in a dance floor melee and that he was escorted outside the nightclub by Officer Riker. Everyone agreed that Charles Pino was outside also, and that a free-for-alling donnybrook then broke out. Officer Riker presented positive testimony that appellants Louis and Charles Pino were the two assailants who broke his jaw and bloodied his lip (Tr. 29). That testimony, standing alone, would have been sufficient to send this case to the jury.⁶ But Riker's version of the incident was corroborated by Officer While (Tr. 115), and by a non-police bystander (Tr. 103, 106-108).

Of course there were minor inconsistencies in the Government's case (and in appellants' defense), as is true in virtually every case brought to court, but these inconsistencies were all placed before the jury and most were explained away by the Government. None went to the main elements of the charged crime: (1) that Louis and Charles Pino each slugged Officer Riker in the face (2) without justifiable and excusable cause; (3) that Officer Riker was a uniformed policeman (4) on duty; and (5) that both appellants knew this.

The defense attempted to contradict only the first two elements by claiming first that neither brother assaulted Riker and, second, that Officer While hit Louis with a blackjack. There was no contradiction of the last three elements. But this only raised an issue of fact for the

⁶ It is well settled that the uncorroborated testimony of a complaining witness is sufficient to sustain a conviction. *Thompson v. United States*, 88 U.S. App. D.C. 235, 188 F.2d 652 (1951).

jury to resolve, which it did when it returned with a verdict of guilty.

III. The closing argument by Government counsel was based only on facts in the record and was not prejudicial to appellant Louis Pino.

(Tr. 106-07, 115, 131-32, 146, 148-49, 163, 182, 242-43, 245, 266-70, 273-74, 276)

Louis Pino asserts that it was plain error affecting his substantial rights for the Assistant United States Attorney to argue to the jury: (1) that Officer Riker had seen appellant before the incident (Tr. 267); (2) that appellant's injuries in an automobile accident soon after the incident were not sufficiently serious to prevent Officer Riker from identifying him at the hospital or to prevent appellant from appearing in court three days after the incident (Tr. 268-69); and (3) that Louis Pino fled the scene like a criminal (Tr. 270).

Neither defense counsel asked the trial court to instruct the jury to disregard the remarks, which are now for the first time on appeal claimed to be prejudicial, so there was no opportunity for that court to correct the error, if any. *White v. United States*, 315 F.2d 113 (9th Cir. 1963). So neither appellant can claim prejudice now unless the remarks in issue constituted plain error affecting his substantial rights. *Karikas v. United States*, 111 U.S.App.D.C. 312, 296 F.2d 434 (1961). Counsel are permitted wide latitude in their closing arguments so long as there is some basis in fact for their assertions. *Pritchett v. United States*, 87 U.S.App.D.C. 374, 185 F.2d 438 (1950), *cert. denied*, 341 U.S. 905 (1951); *Stewart v. United States*, 101 U.S.App.D.C. 51, 247 F.2d 42 (1957). All but one of Government counsel's closing statements were based on facts in the record, and that one statement was corrected by defense counsel and was nonprejudicial.

The comment with regard to Officer Riker having seen Louis Pino prior to the assault was clearly a factual misstatement, unless it is interpreted to mean that Riker had

seen Louis inside the tavern. There is nothing to show that the remark was an intentional misstatement or that it was prejudicial. The statement may have reflected faulty recollection because the other officer had testified that he knew Louis Pino before. Even so, it was not prejudicial. Appellant's counsel took sharp issue with the misstatement and forcefully represented to the jury that Government counsel's recollection was wrong (Tr. 242-43). The trial court cautioned the jury that arguments of counsel were not evidence and that it was the jury's recollection of the facts which controlled (Tr. 273-74, 276). Everyone, including Louis Pino himself, admitted that he was in fact the person escorted outside the nightclub by Officer Riker (Tr. 148-49). Riker had ample opportunity to view Louis on the night in question. Two other witnesses corroborated Riker's testimony that Louis hit him (Tr. 106-07, 115). Thus, whether Riker knew appellant before the incident or not had little bearing on the correctness of his identification of Louis as one of his assailants.

Government counsel's remarks about the injuries suffered by appellant went only to the question of whether Officer Riker *could have made* a positive identification of Louis Pino at the hospital, but everyone agrees that the identification was correct and that Louis was in fact the person on the operating table. There is no doubt that the circumstances of this identification were such that it could not have had much probative value, i.e., Riker went to the hospital knowing that he would see Louis there, and he saw Louis' brother just outside the hospital. However, as indicated above, the evidence regarding Riker's initial identification of Louis as one of his assailants was so overpowering that the hospital identification had little or no bearing on the case. In any event, the testimony was in the record and Government counsel was referring to facts when he made the comment.

It may well be that appellant was indeed in the hospital on September 14, but all of the evidence brought out in

the trial (upon which Government counsel was commenting) indicated otherwise. Government counsel learned that appellant was in court on September 14 by cross-examining appellant's own witness, bondsman John E. Light (Tr. 131-32):

Q But you don't have any definite record as to the day this man was in court on your bond; is that correct?

A On my book here I have it for September 14th, which was a Tuesday.

If this is a misstatement of fact, appellant himself acknowledged that he was in court on September 14 (Tr. 163). Appellant's brother was "not sure" how long Louis was in the hospital, a "couple" of days or "a week or so." (Tr. 182). And appellant's wife testified that he was in the hospital only "four or five days." (Tr. 146). Thus from the facts brought out from appellant's own witnesses, the Government counsel was well within the bounds of the record when he referred to Louis' short stay in the hospital and his appearance in court on September 14.

Louis' counsel argued to the jury that the Government had failed to establish that Louis had a criminal record (Tr. 245), and the Government responded in rebuttal that it was naive to argue that persons do not commit crimes simply because they do not have a criminal record (Tr. 266). Thus it was clear to the jury that Louis did not have a criminal record. The final rebuttal statement by the Government, and the one here challenged, alluded to the fact that Louis "fle[d] the scene like he was a criminal," even if brother Charles did not. This was not prejudicial because Louis did in fact flee. He admitted it himself. If flight may be characterized as an indication of criminality, and it is well settled that it may, then it was perfectly permissible for the Government to so argue.

Arguments by the Assistant United States Attorney who tried this case were based on facts in the record or were not prejudicial. There was no plain error.

IV. There was no error in the instructions.

(Tr. 291)

Charles Pino belatedly challenges the instructions—to which he expressed complete satisfaction below (Tr. 291)⁷—on a ground parallel to his attack on the indictment, namely, that the trial court erred by failing to instruct the jury on “intent.” (See Argument No. I, *supra*.) Appellee would concede that an “intent” instruction should have been given—if this were a specific intent crime or if the issue of unintentional assault had been raised—but neither of these two prerequisites were present in this case.

Assault on a policeman (22 D.C. Code § 505) is not a “specific intent” offense, because the statute makes no mention of “intent” or even comparable language, such as “wilfully assault.” This Court recently characterized a similar statute in this language:

“The statute is silent as to any requirement of intent for an assault with a dangerous weapon, although in all the other offenses to which appellant refers the requirement is explicit. Furthermore, these other offenses resemble crimes of attempt, in respect of which an essential element is an intent to commit a particular crime.” *Parker v. United States, supra*, 359 F.2d at 1013.

The omission of “intent” from the statute indicates that Congress did not intend to make it an element of the offense, except insofar as it may be an incidental part of the crime of assault. All that is necessary is that the defendant *know* that the person assaulted is a policeman on duty. Of course, if there were some issue surrounding the “assault” element of the crime, to the effect that the assault was accidental or unintentional, then some instruction on the general intent requirement for assault

⁷ This expression of satisfaction may preclude any consideration of his challenge to the instructions on appeal. Rule 30, F.R.Cr.P.; see, e.g., *Kelly v. United States*, No. 19746, decided March 8, 1966.

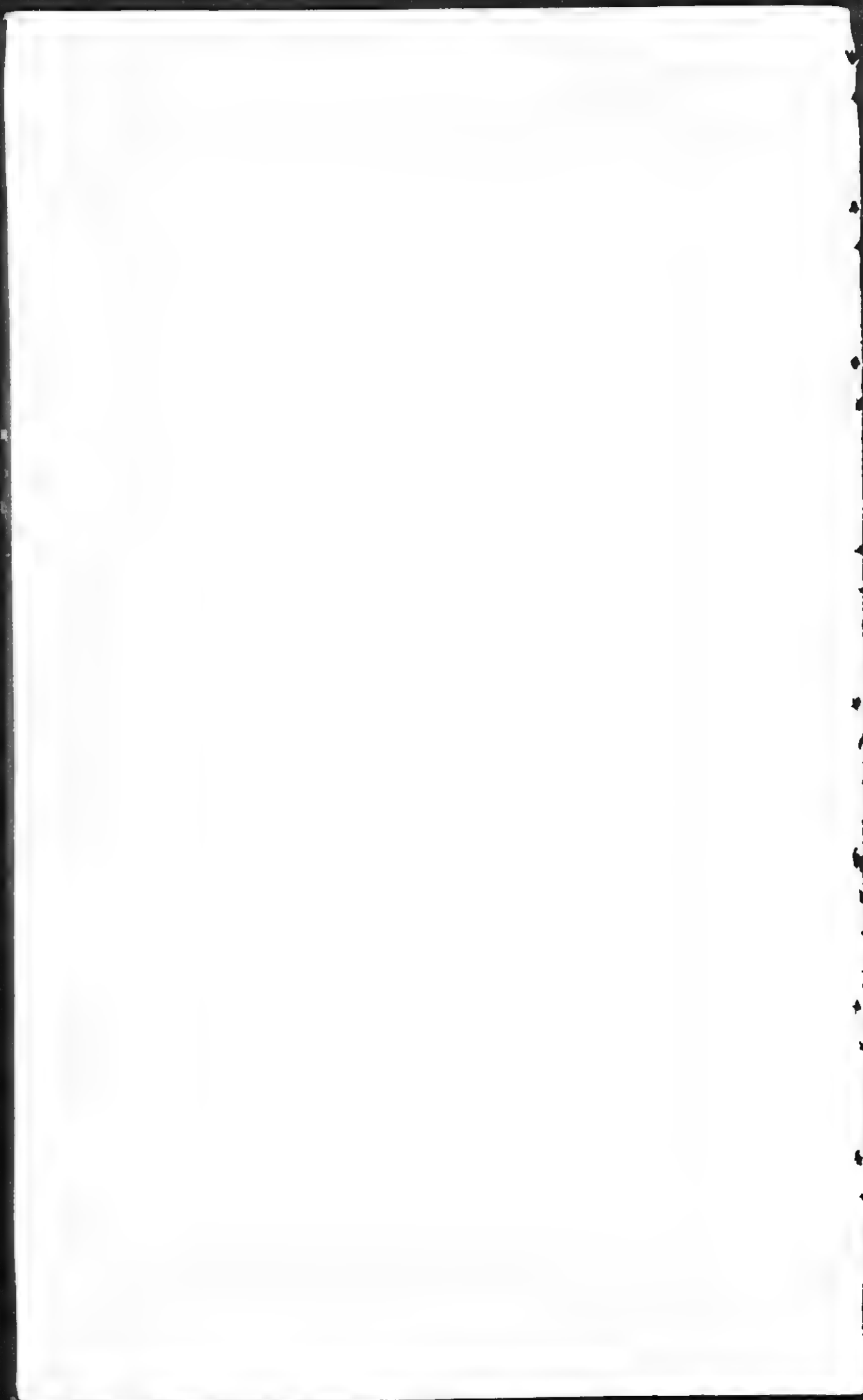
would be called for. However, no such issue was present in this case, so it was unnecessary for the court to instruct on this secondary or subsidiary aspect of the assault element. Everyone admitted that Officer Riker was assaulted; the only issue was *who* did it. It is hard to derive error from the court's instructions—much less plain error.

CONCLUSION

WHEREFORE, we respectfully request that the judgment below be affirmed.

DAVID G. BRESS,
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JOEL D. BLACKWELL,
DEAN W. DETERMAN,
Assistant United States Attorneys.



APPELLANT'S PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,979

CHARLES PINO,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 19 1966

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December 19, 1966

Attorney for Appellant

APPELLANT'S PETITION FOR REHEARING EN BANC

THE FAILURE OF THE TRIAL COURT TO
GIVE ANY INSTRUCTION WHATSOEVER ON
INTENT, AN ESSENTIAL ELEMENT OF THE
CRIME OF ASSAULT ON A POLICE OFFI-
CER, WAS PLAIN AND REVERSIBLE ERROR

In the instructions to the jury, the Trial Court failed to make any mention whatsoever of intent, an essential element of the crime of assault on a police officer. 1/ This failure was especially prejudicial in view of the vague and confused wording of the indictment, which also lacked any reference to this necessary element of the crime of which appellant was convicted.

Although this issue was fully briefed and argued before the panel of this Court, the per curiam opinion affirming Appellant's conviction failed to make any reference to this issue raised by both appellants. 2/

This Court has consistently held that the omission of an essential element of the crime from the instructions to the

1/ D.C. Code § 22-505(a):

Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with any officer or member of any police force operating in the District of Columbia while engaged in or on account of the performance of his official duties, shall be fined not more than \$5,000 or imprisoned not more than five years or both.

2/ Appellant Charles Pino (No. 19,979) and appellant Louis Pino (No. 19,980) are brothers who were tried together and whose cases were consolidated for consideration by this Court.

jury constitutes plain error under Rule 52(b) of the Federal Rules of Criminal Procedure.^{3/} This Court so held in Jackson v. United States, 121 U.S.App.D.C. 160, 348 F.2d 772 (1965), in which the issues were strikingly similar to those raised in the instant case. In the charge to the jury in Jackson, the Trial Court made only a general reference to the element of intent in a robbery case.^{4/} This Court held that an instruction was required on specific intent and the failure to do so constituted plain error despite the failure of trial counsel to make a timely objection at trial. In the instant case, no reference to intent, "general" or "specific," was made to the jury, either in the instructions or in the confusingly worded indictment which was carried into the jury room.^{5/}

In its brief ^{6/} and at oral argument, the Government contended that the omission of the element of intent from the

^{3/} No exception was taken at trial by counsel for either defendant to the lack of an instruction on intent. Assigned counsel for appellant Charles Pino in this appeal was also assigned counsel at trial. The Court's failure to charge the jury on this crucial element of the offense passed unnoticed at trial.

^{4/} D.C. Code § 22-2901, 1961 ed.

^{5/} The confusion resulting from the vaguely worded indictment in this case is demonstrated by the reaction of the jury during their deliberations. A note was sent out from the jury room with the following query:

"If the defendants are found guilty on any one or more of the six adjectives describing the offense, are we instructed to find the defendants guilty as charged?" (Tr 293-294)

^{6/} Brief for Appellee, page 15.

instructions was not error because the element of intent was not put in issue at trial and that the element of intent is not recited in the statute. Similar arguments were considered and rejected by this Court in Byrd v. United States, 119 U.S. App.D.C. 360, 342 F.2d 939 (1965), which also involved the District of Columbia robbery statute. Byrd reaffirmed the rule that the Government must prove and the Court must instruct on every essential element of the crime charged even if all of the elements are not set forth in the statute. If such an element is omitted from the instruction, plain error can be found on appeal lacking an objection at trial. See, e.g., Screws v. United States, 325 U.S. 91 (1945); Williams v. United States, 76 U.S.App.D.C. 299, 131 F.2d 21 (1942); Mills v. United States, 97 U.S.App.D.C. 131, 228 F.2d 645 (1955); McDonald v. United States, 109 U.S.App.D.C. 98, 284 F.2d 232 (1960); Barry v. United States, 109 U.S.App.D.C. 301, 287 F.2d 340 (1961); Jones v. United States, 113 U.S.App.D.C. 352, 356, 308 F.2d 307, 311 (1962).

The Government also contends that the crime of assault on a police officer is a "general intent" crime rather than a "specific intent" offense. Consequently, the Government contends, that no instruction at all need be given on intent in such cases.

In support of its position, the Government relies on Parker v. United States, ____ U.S.App.D.C. ____, 359 F.2d 1009 (1966), in which this Court refused to hold that it was plain error for the trial court to fail to instruct that intoxication

could be sufficient to negate the intent to do serious injury in a case involving assault with a dangerous weapon.^{7/} In its decision, this Court made a clear distinction between assault involving a dangerous weapon and other forms of assault when it said: "The gist of the crime is found in the character of the weapon with which the assault is made," quoting Goswick v. State, 143 So.2d 817, 820 (Fla. 1962) (emphasis Court's). 359 F.2d at 1012. The Court in Parker also indicated that assault with a dangerous weapon is grouped in the D.C. Code with crimes requiring a "particular intent." 359 F.2d at 1013. The crimes with which assault with a dangerous weapon is grouped, the Court stated, resemble crimes of attempt "of which an essential element is an intent to commit a particular crime," 359 F.2d at 1013. Among these crimes, the Court found simple assault, D.C. Code, § 22-504. 359 F.2d at 1013, n. 7.

Although the Court in Parker did not include assault on a police officer in this grouping, it seems obvious that if simple assault requires intent as an element, so does assault on a police officer which carries the additional element of scienter.

It is also the customary practice of the trial courts in this jurisdiction to include an instruction on intent in defining the crime of assault on a police officer. See, Junior Bar Section of the Bar Association of the District of Columbia, Criminal Jury Instructions for the District of Columbia, § 56 (1966).

CONCLUSION

Because of the obvious substance of the issue set forth herein and the failure of the panel to answer this contention in the per curiam opinion affirming appellant's conviction, appellant respectfully requests rehearing en banc on this question.

Respectfully submitted,

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(Appointed by this Court)

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing En Banc is presented in good faith and not for the purpose of delay.

David C. Niblack

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Rehearing En Banc was mailed, postage prepaid, to the Office of the United States Attorney, United States Court House, Washington, D.C. 20001, this 19th day of December, 1966.

David C. Niblack